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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GABE KAIMOWITZ,

Petitioner,

—v.—

BILL FREDERICK, THE *ORLANDO TIMES*,
DR. CALVIN COLLINS, LOTTIE COLLINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MORTON STAVIS
GEORGE COCHRAN
Center for Constitutional Rights
666 Broadway
Seventh Floor
New York, New York 10012
(212) 614-6427

JEFFREY W. STEMPEL*
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7953

**Counsel of Record*

41

QUESTIONS PRESENTED

1. Consistent with either Federal Rule of Civil Procedure 11 or 42 U.S.C. §1988, may a court deem a case both factually and legally frivolous and impose substantial monetary sanctions where the same court also denied a motion to dismiss, repeatedly denied summary judgment, and denied directed verdict in the case and where neither plaintiff nor counsel misrepresented the nature of the factual and legal matter to be set forth at trial?

2. In applying Fed. R. Civ. P. 11, may a district judge award substantial sanctions without first considering whether the substantial monetary award imposed constitutes the least severe sanction effective to accomplish the purposes of Rule 11?

3. In assessing Rule 11 sanctions, may the trial court impose upon the offending party collateral costs of judicial administration, such as juror fees?

4. May a district judge who has previously disqualified himself in cases involving an individual, because of personal bias toward that person, later adjudicate and award substantial sanctions in a case where the individual is a named plaintiff without violating 28 U.S.C. §§144, 455(a) and 455(b)(1)?

PARTIES

The parties to the proceedings are petitioner Gabe Kaimowitz and respondents Bill Frederick (both individually and as Mayor of Orlando, Florida), The Orlando Times, and the owners of the Times, Dr. Calvin Collins and Lottie Collins.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

GABE KAIMOWITZ, Petitioner

v.

BILL FREDERICK, THE ORLANDO TIMES, DR. CALVIN COLLINS, LOTTIE COLLINS, Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Gabe Kaimowitz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on March 11, 1992.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit, a denial of petitioner's motion for rehearing and suggestion for rehearing en banc is not reported and is reprinted in the appendix hereto, p. 1a, infra. The Eleventh Circuit opinion is reported at 952 F.2d 410 and reprinted in the appendix, p. 2a, infra. The trial court order has not been reported. It is reprinted in the appendix, p. 3a, infra.

JURISDICTION

This Court has jurisdiction to review the instant case pursuant to 28 U.S.C. §1254(2). On March 11, 1992, the Eleventh Circuit issued an order denying petitioner's motions seeking rehearing. See p. 1a, infra. On May 14, 1992, Justice Kennedy ordered that the time for filing this petition for writ of certiorari be extended to and including July 9, 1992 (Order No. a-849).

STATUTES AND RULES INVOLVED

28 U.S.C. §144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not

less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

42 U.S.C. §1988

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1981, 1982, 1983, 1985 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rule of Civil Procedure 11

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address. Except when otherwise

specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

From November 1, 1986 until March 1987, Plaintiff-Petitioner Gabe Kaimowitz ("Kaimowitz") was employed as consulting managing editor by defendant The Orlando Times ("the Times"), which is owned by defendant-respondents Dr. Calvin Collins and Lottie Collins ("Collins").[1] Petitioner was discharged for failing to obtain approval prior to publication of a caption critical of defendant-respondent Bill Frederick ("Frederick"), Mayor of Orlando. After his dismissal, the Times refused to accept advertising submitted by Petitioner and also refused to accept for publication news articles submitted by others associated with Kaimowitz or his clients.

Petitioner filed suit alleging violations of 42 U.S.C. §§1981, 1983 and 1985 as well as claims arising under state law. Upon learning that the case had been assigned to Judge G. Kendall Sharp, Petitioner submitted an affidavit of prejudice pursuant to 28 U.S.C. §§144 and 455. The basis for the recusal motion was Judge Sharp's membership in a club with a history of restrictive admission policies toward blacks and Jews. Kaimowitz is Jewish and the majority of his clients are black. In four other cases involving Petitioner, Judge Sharp disqualified himself because of bias toward Kaimowitz or facts subjecting the court's impartiality to reasonable question.[2] In the instant matter, however, Judge Sharp

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[1] The instant matter was initially styled below as Elona v. Frederick because Petitioner Kaimowitz was writing under the pen name David Elona at the time of his discharge from the Orlando Times.

[2] See Kaimowitz v. Greater Orlando Legal Services, Inc., Case. No. 86-781-CIV-ORL-18 (March 3, 1988); Kaimowitz v. Florida Bar, Civ. No. 88-835-CIV-ORL-18 (Sept. 22, 1988) ; Committee of Organized Groups (COG) v. City of Orlando,

refused without explanation to recuse himself. Subsequent motions for disqualification were also denied.

Respondent Frederick moved to dismiss the complaint for failure to state a claim and for Rule 11 sanctions. After the court's decision to defer action on this motion, Respondent moved for summary judgment. Following denial of this motion, Respondent made three additional motions seeking summary judgment, all of which were again denied or deferred by the court.

Trial of the case took four days. After denial of Respondent's motion for directed verdict, the jury deliberated and found for defendants. Thereafter, the court entered an "Order to Show Cause" requiring Petitioner to defend Respondent's Rule 11 motion. Subsequently, a hearing was held and the court ordered sanctions. Petitioner was ordered to pay more than $37,000, virtually all of defendant's court costs and counsel fees as well as more than $2,000 in administrative costs and expenses associated with the proceeding, including juror fees (appendix p. 6a).

The court concluded that sanctions were justified because "[b]ased on the evidence adduced at the hearing and on the court's observations of the pleadings and of the trial . . .this lawsuit was frivolous and vexatious from the beginning." (appendix, p. 4a). Referring to its decisions refusing Respondent Frederick's motions for pretrial dismissal, the court's justification was as follows:

> [t]he court, however, allowed the case to go to trial not because plaintiff presented sufficient

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Fla., Case No. 88-962-CIV-ORL-18 (Oct. 31, 1988); Williams v. Orange Co., Fla. Bd. of Commrs., Case No. 90-547-CIV-ORL-18 (July 23, 1990).

> evidence to withstand the pre-trial motions, but because the court wanted to see whether plaintiff could present any evidence at trial. . . . [i]n this case . . . decisive facts never emerged, the case was frivolous and unreasonable from the outset, and plaintiff failed 'to produce any evidence in support of material issues' on any of his claims. . . . the court sent the case to the jury not because it perceived factual basis for the claim, but because it wanted plaintiff to receive a jury verdict. Only then would plaintiff know that the outcome of the case was based on the merits rather than on judicial bias. (appendix p. 5a-6a).

The Eleventh Circuit affirmed without opinion (appendix, p. 2a) and denied Petitioner's motion for rehearing and suggestion of rehearing en banc (appendix, p. 1a).

REASONS FOR GRANTING THE WRIT

I.

There Exists A Sharp Division in the Circuits Regarding Whether A Claim That Has Survived Pretrial Dismissal Motions and Received a Full Scale Trial Can Be Unsupported In Fact Or Unwarranted In Law Within The Meaning of Rule 11.

Rule 11 deems sanctionable only those claims that are not well grounded in fact, warranted by existing law, or supported by a good faith basis for reform in the law. It targets situations where it is "patently clear that a claim has

absolutely no chance of success".[3] A complaint or claim failing to meet this standard would logically be vulnerable to a motion to dismiss or summary judgment motion and would normally be eliminated by the district court well before trial. Presumably, therefore, a claim so factually weak that it fails to satisfy Rule 11 must logically also fail to create a genuine issue requiring trial and could therefore be quickly dispatched with an early motion for summary judgment in those cases where a Rule 12(b)(6) motion can not itself eliminate the frivolous claim.[4] Consequently, if both Rule 12(b)(6) dismissal and summary judgment were properly denied, there can be, absent fraud or other egregious misconduct, no sanctionable violation of Rule 11.[5] Similarly, a claim that is so utterly frivolous that it permits an award of counsel fees under 42 U.S.C. §1988 must by definition lack the factual and legal strength to withstand pretrial disposition. Despite the logic of this approach, lower courts have divided on whether denial of potential dismissal limits a court's power to impose sanctions.

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[3] Associated Indem. Corp. v. Fairchild Indus., Inc., 961 F.2d 32, 35 (2d Cir. 1992)(citations omitted).

[4] See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (where facts of record permit only one conclusion, summary judgment apt).

[5] See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482-83 (3d Cir. 1987)(even claims quickly dismissed pursuant to Rule 12(b)(6) are not presumptively sanctionable); Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282, 289-90 (4th Cir. 1987)(no violation of Rule 11 to pursue litigable issue of fact); American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 124 (1988)("ABA Standards").

Panels in three circuits have strongly stated that claims surviving through trial are not frivolous within the meaning of Rule 11. See Healey v. Chelsea Resources, Ltd., 947 F.2d 611 (2d Cir. 1991)(denial of summary judgment demonstrates that claimant's testimony not incredible or inadequate as a matter of law); [6] Mihalik v. Pro Arts, Inc., 851 F.2d 790, 794 (6th Cir. 1988)("if [plaintiffs'] claims were so frivolous, we find it remarkable that the district court would allow the case to go to trial. Obviously, the court believed that a trial was necessary in order to determine which side had the superior position. In such a situation, it would be highly unusual and almost certainly inappropriate to impose Rule 11 sanctions against one party merely because the other side prevailed"); National Association of Govt. Employees, Inc v. National Federation of Fed. Employees, 844 F.2d 216, 223 (5th Cir. 1988)(Rule 11 sanctions inappropriate where court has denied directed verdict, suggested settlement). This appeared at one time to be the view of the Eleventh Circuit. See Sullivan v. School Board of Pinellas County, 773 F.2d 1182 (11th Cir. 1985)(suggesting that claims surviving attack by pretrial motion and going to trial are not apt for Rule 11 sanction absent special circumstances). A respected state court has also taken this approach in applying state versions of Rule 11. See, e.g., Uselman v. Uselman, 464 N.W.2d 130, 144 (Minn. 1990)(claims reaching trial were not apt candidates for sanction under Minn. R. Civ. P. 11).

Other panels have adopted the opposite position,

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[6] The Second Circuit in Healey reversed the bulk of sanctions imposed in a district court opinion that clearly denied any possible link between a summary judgment denial and the factual and legal colorability of the claim. See 133 F.R.D. 449, 454 (S.D.N.Y. 1990). See also Greenberg v. Hilton Int'l Co., 870 F.2d 926, 937 (2d Cir. 1989)(Ordinarily, claims surviving to trial should not be sanctionable).

suggesting that a claim's survival through trial bears no relation to sanctions practice. See Jennings v. Joshua Independent School District, 877 F.2d 313, 319-20 (5th Cir. 1989) cert. denied, 496 U.S. 935 (1990)(affirming bulk of sanctions awarded against plaintiff based on alleged legal inadequacy of claim that survived through trial)(modified at 948 F.2d. 194 (1991), cert. denied, __ U.S. __, 60 U.S.L.W. 3815 (June 1, 1992); LeMaster v. United States, 891 F.2d 115, 121 (6th Cir. 1989); Mann v. G & G Mfg., Inc., 900 F.2d 953, 960-61 (6th Cir. 1990) cert. denied. sub. nom., Sloan v. G & G. Mfg., Inc., ___ U.S. ___, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990); Muthig v. Briant Point Nantucket, Inc., 838 F.2d 600, 606 (1st Cir. 1988); Barrios v. Pelham Marine, Inc., 796 F.2d 128, 132 (5th Cir. 1986); (affirming or awarding Rule 11 sanctions despite prior denial of summary judgment motions).

Scholars and bar associations have supported the view that claims surviving pretrial dismissal motions should be presumptively immune from Rule 11 sanctions. See Committee on Federal Courts, Association of the Bar of the City of New York, Comments on Federal Rule of Civil Procedure 11 and Related Rules, 46 The Record of the Ass'n of the Bar of the City of N.Y., 267, 286 (1991)("[a]bsent fraud or knowing misrepresentation, compensatory sanctions should not be imposed when the party being sanctioned survived a motion to dismiss or for summary judgment."(footnote omitted); Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse §11(F) at 169-70 (1989)(although summary judgment denial should not be a per se bar to sanctions, "fact that a case gets to trial is some measure of its merit"); William Scharzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1019 (1988)("[o]ne might well wonder how a case could be so frivolous as to warrant sanctions if it has sufficient merit to get to trial").

The Advisory Committee on the Federal Civil Rules of the Judicial Conference of the United States has strongly

suggested the same approach. Recently, the Advisory Committee issued a substantially revised Rule 11 designed to lessen its potential chilling effect. The draft Advisory Committee Note to Proposed Rule 11 states that "[I]f a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient 'evidentiary support' [within the meaning of the proposed Rule] for purposes of [satisfying] Rule 11." See Advisory Committee on Civil Rules, Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 36 (May 1992)("Proposed Rules").[7]

The imposition of sanctions against Petitioner reflects the error in cases finding no relation between pretrial proceedings and Rule 11 and resembles the discredited merchant's practice of "bait-and-switch": plaintiff is encouraged to pursue the claim and then required to pay defendant's subsequently accumulated, sizeable counsel fees merely because he lost at trial. See In re Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986), cert. denied sub. nom., Real v.

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[7] An approach permitting sanction of claims heard at trial is particularly inapt when applied to 42 U.S.C. §1988. In Hughes v. Rowe, 449 U.S. 5 (1980); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) this Court established a seemingly clear presumption against sanctioning unsuccessful civil rights and job discrimination claimants absent a palpably frivolous case apparent to all from the outset. Courts interpreting Section 1988 in the light of Christiansburg Garment and Hughes v. Rowe have hewed to this principle, making defense fee awards a rarity. See, e.g., Unity Ventures v. County of Lake, 894 F.2d 250 (7th Cir. 1990); Vaughner v. Pulito, 804 F.2d 873 (5th Cir. 1986); Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 1188-90 (11th Cir. 1985); Jones v. Texas Tech University, 656 F.2d 1137, 1145 (5th Cir. 1981); McGregor v. Bd. of Court Cmm'rs for Palm Beach County, 130 F.R.D. 464 (S.D. Fla. 1990).

Yagman, 484 U.S. 963 (1987)(deterrent purpose of Rule 11 not well-served "by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end").

The sanctions order also has implications that go beyond mere isolated error. Courts operating in the manner of the trial court below place attorneys and litigants in an untenable position. Counsel and the parties must not only "stop and think" about the Rule 11 implications of a litigation position prior to filing a paper with the court but must also assess the risk of proceeding with the claim or position throughout the litigation, knowing that a court could belatedly label the paper "frivolous" no matter how many pretrial rulings to the contrary are made by the court.[8]

Unless this Court sets forth clear limits preventing similar eleventh hour sanctioning after trial, attorneys and litigants, face a continuing, substantial risk of sanctions merely by continuing to prosecute claims for which they have the benefit of a favorable pretrial ruling. Further, the history of the instant case suggests that busy appellate courts have read the "abuse of discretion" review standard governing sanctions practice as a virtual blank check for district judges. This situation can only have an unwise chilling effect on counsel and clients, even those with meritorious claims. The

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[8] The Civil Rules Advisory Committee has recognized this risk and attempted to minimize it through Proposed Amended Rule 11. Under the Proposed Rule, the filing of a signed paper with the court would impose a continuing duty on counsel and the parties to correct or withdraw positions that later are seen as frivolous. However, counsel fees may not be awarded as a sanction where an offending paper is modified or withdrawn within 21 days after service of the motion by opposing counsel. See "Proposed Rules" at 33).

instant case suggests the need for this Court to exercise its supervisory powers to clarify application of these important and frequently invoked federal laws.

II.

The Circuits Are Also In Sharp Conflict Regarding Whether to Adopt the "Least Severe Sanction" Test for Reviewing Rule 11 Sanctions.

Approximately half the circuit courts have expressly adopted the "least severe sanction" approach in order to control Rule 11 practice and prevent trial court abuses. As one circuit court recently stated, Rule 11 should "not degenerate into nothing more than a docket control device that the district courts use to punish unsuccessful litigants who dare to raise their claims or defenses in federal court."[9] Under this standard, courts invoking Rule 11 may impose only the least severe sanction adequate to serve the purposes of the Rule. See, e.g., Danvers v. Danvers, 959 F.2d 601, 605 (6th Cir. 1992); White v. General Motors Corp., 908 F.2d 675, 684-85 (10th Cir. 1990), cert. denied, __ U.S. __, 111 S. Ct 788, 112 L. Ed. 2d 850 (1991); Hilton Hotels Corp. v. Banov, 899 F.2d 40, 46 (D.C. Cir. 1990); Thomas v. Capital Securities Serv., Inc., 836 F.2d 866 (5th Cir. 1988) (en banc); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1437 (7th Cir. 1987); Cabell v. Petty, 810 F.2d 463, 466-67 (4th Cir. 1987); In re Yagman, 796 F.2d 1165, 1182-83 (9th Cir. 1986), cert. denied, sub. nom., Real v. Yagman, 484 U.S. 963 (1987). Prominent bar organizations have also endorsed the least severe sanction approach. See, e.g., ABA Standards, supra, 121 F.R.D. at 124; New York Bar Comments, supra, 11 The Record at 282-86.

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[9] Akin v. Q-L Investments, Inc., 959 F.2d 521 (5th Cir. 1992).

However, the remaining circuits, including the Eleventh Circuit, have yet to adopt the least severe sanction remedial standard. See Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 913 (1992) (more than $1 million in sanctions assessed against plaintiff's counsel). As a consequence, lawyers and litigants in these circuits are at greater risk of sanctions. For example, courts applying the least severe sanction approach have focused primarily on the deterrent purpose of Rule 11, asking what sanction will discourage future frivolous litigation and poor lawyering practices without punishing the offending party or counsel beyond the point of adequate deterrence. Proportionality was not examined in the instant case.

In addition, the Fifth Circuit, which has been the foremost proponent of the least severe sanction approach, requires that the sanction imposed is in fact the least severe sanction adequate to accomplish the deterrent purposes of Rule 11. Trial courts in the Fifth Circuit must "enter specific factual findings to assist the appellate court in its review" of both the decision to sanction and the type of sanction imposed. They are strongly encouraged and virtually required to indicate the factors that led to the sanction and to describe the consideration and rejection of alternative sanctions. See Akin v. Q-L Investments, Inc., 959 F.2d 521 (5th Cir. 1992). Other "least severe sanction" circuits require that a sanctioning court consider the offending party's ability to pay. See, e.g., Danvers v. Danvers, 959 F.2d 601 (6th Cir. 1992); White v. General Motors Corp., 908 F.2d 675, 683 (10th Cir. 1990), cert. denied, __ U.S. __, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991). In the instant case, the district court neither made particularized findings nor considered Petitioner's ability to pay.

Rule 11 sanctions do not "shift the entire cost of litigation; they shift only the cost of a discrete event." Business Guides v. Chromatic Communications Enterprises,

Inc., __ U.S. __, 111 S. Ct. 922, 934, 112 L. Ed. 2d 1140, 1160 (1991). Consequently, a court determining a Rule 11 motion must focus on the particular statements in a paper filed with the court and make findings as to why that portion of the paper violates Rule 11. Because the district courts Order lacked such focus and explanation and implicitly rejected the least severe sanctions approach, it effectively converted Rule 11 into a fee shifting statute which violates Business Guides and other precedents of this Court. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)(Rule 11 not a fee-shifting statute).

III

There Exists a Conflict in the Circuits Regarding Whether The Collateral Costs of Judicial Administration, Such As Juror Fees, May Be Awarded As A Rule 11 Sanction

Several circuit courts have firmly taken the view that even if conduct is sanctionable pursuant to Rule 11, "overhead" expenses of the judicial system are not a properly recoverable item of sanctions. See, Blue v. Dept. of the Army, 914 F.2d 525 (4th Cir. 1990), cert. denied sub. nom, Chambers v. United States Department of the Army, _ U.S._, 111 S. Ct. 1580, 113 L. Ed. 2d 645 (1991). See also White v. Raymark Indus., 783 F.2d 1175 (4th Cir. 1986); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987)(recoverable costs under 28 U.S.C. §1920 strictly construed).

In Blue, the Fourth Circuit held that judicial and support staff salaries could not be shifted to either counsel or to a party as a Rule 11 sanction but found that juror fees might be part of a sanction award if authorized by local rule. See 914 F.2d at 543. Because the Middle District of Florida has no local rule providing for such shifting of overhead expenses to a sanctioned litigant, the Eleventh Circuit decision below stands in direct conflict with the Fourth

Circuit.

IV.

The Erratic Recusal Practice of the District Judge Conflicts With Decisions of This Court in a Matter of Fundamental Importance – The Integrity of the Judicial System.

As detailed in the Statement of the Case, the most euphemistic term for describing the relationship between the trial judge and Petitioner is "strained." Kaimowitz has been an active lawyer and litigant who sought Judge Sharp's disqualification in several matters due to Judge Sharp's reported membership in the University Club, a private club widely reputed to exclude women, blacks and Jews from membership. Kaimowitz is Jewish and specializes in civil rights law, primarily representing black clients. Although Judge Sharp appears unrepentant about his association with the University Club,[10] he nonetheless at one time disqualified himself in cases involving Kaimowitz in part because he admitted personal distaste for Kaimowitz. Despite this, Judge Sharp has subsequently presided over other cases involving Kaimowitz, including the instant case.

Under this Court's precedent Judge Sharp should have recused himself pursuant to 28 U.S.C. §455(a), which requires recusal even if the judge is unaware of the suspicious circumstances calling his impartiality into question. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847

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[10] Ironically, Judge Sharp's affiliation with the University Club would today probably be sufficient to prevent his appointment to the bench in view of the Senate Judiciary Committee's recent treatment of such associations by judicial nominees.

(1988). "The goal of section 455(a) is to avoid even the appearance of partiality" Liljeberg, (486 U.S. at 858) so that the statute promotes "public confidence in the integrity of the judicial process." Liljeberg, 486 U.S. at 858.

The circuits are in conflict regarding whether Section §455(a) disqualification is affected by the source of the court's bias. See Waller v. United States, __ U.S. __, 60 U.S.L.W. 3813 (June 1, 1992)(White and O'Connor, JJ., dissenting from denial of certiorari because of inter-circuit conflict on this issue). One circuit has held that a section 455(a) challenge is permitted even where factors bringing the judges's impartiality into question are acquired through judicial proceedings. See United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990); United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978). However, five circuit courts have held that Section 455(a) disqualification will not lie where there is a judicial origin of factors subjecting the judge's fairness to question. See United States v. Somorons, 918 F.2d. 592, 599 (6th Cir. 1990); United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989); United States v. Monoco, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986) cert. denied, 480 U.S. 946 (1987). Among these is the Eleventh Circuit. See McWhorter v. Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) reh. denied, 917 F.2d 570 (1990). Because there was little discussion of the issue below, it is unclear what role this precedent may have played in the instant case.

However, disqualification is required under the recusal statutes (§§144 and 455(b)(1) as well as §455(a)) where the Judge's bias, even if judicially acquired, is so pervasive as to permeate the trial proceedings and make fair administration of justice impossible. See Berger v. United States, 255 U.S. 22 (1921). A sufficient lack of impartiality--or even its serious possibility--has been held to violate constitutional due process. See Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813

(1986); Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972).

Unfortunately, the Eleventh Circuit appears to hold little allegiance to this Court's precedent regarding disqualification. See, e.g., Parker v. Connors Steel Company, 855 F.2d 1510 (11th Cir. 1988) cert. denied, 490 U.S. 1066 (1989), (finding "harmless error" in §455(a) violation where trial judge decided case on summary judgment and law clerk working on the matter was the son of a lawyer representing two of the prevailing parties benefitting from the judge's summary judgment ruling). See also Note, Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a), 1989 Wis. L. Rev. 1033 (criticizing Parker as inconsistent with this Court's decision in Liljeberg).

CONCLUSION

This case presents important questions regarding the consistent, fair, and useful operation of key sanctions, fee shifting, and disqualification practices as to which there are significant conflicts within the circuits. Petitioner's case merits review by this Court.

Respectfully Submitted,

MORTON STAVIS
GEORGE COCHRAN
Center for Constitutional Rights
666 Broadway Seventh Floor
New York, NY 10012
(212) 614-6427

JEFFREY W. STEMPEL
Brooklyn Law School
250 Joralemon Street

Brooklyn, NY 11201
(718) 780-7953
Counsel of Record

July 9, 1992 .

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-4048 & 90-4154

Filed U.S.
Court of Appeals
Mar. 11, 1992
Miguel J. Cortez
Clerk

DAVID ELONA, a/k/a H.G. Lifeson, a/k/a
THE OLD STORYTELLER, GABE KAIMOWITZ,

Plaintiffs-Appellants,

versus

BILL FREDERICK, MAYOR OF ORLANDO, FLORIDA, INDIVIDUALLY, BILL FREDERICK, IN HIS OFFICIAL CAPACITIES, THE ORLANDO TIMES, a news weekly and its publisher, DR. CALVIN COLLINS, LOTTIE COLLINS, AND THEIR AGENTS,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT and BIRCH, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

\s Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-4048 & 90-4154

D.C. Docket No. 89-00162-Civ-Orl-18

DO NOT PUBLISH

DAVID ELONA, a/k/a H.G. LIFESON, a/k/a THE OLD STORYTELLER, GABE KAIMOWITZ,

Plaintiffs-Appellants,

versus

BILL FREDERICK, MAYOR OF ORLANDO, FLORIDA, INDIVIDUALLY, BILL FREDERICK, IN HIS OFFICIAL CAPACITIES, THE ORLANDO TIMES, a news weekly and its publisher, DR. CALVIN COLLINS, LOTTIE COLLINS, AND THEIR AGENTS,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

---

(December 31, 1991)

Before HATCHETT and BIRCH, Circuit Judges, and MORGAN, Senior Circuit Judge.
PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

MORGAN, Senior Circuit Judge.
PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID ELONA, a/k/a H.G. LIFESON, a/k/a THE OLD STORYTELLER, a/k/a GABE KAIMOWITZ,

Plaintiff,

v.

CASE NO. 89-162-CIV-ORL-18

BILL FREDERICK, Mayor of Orlando, Florida, individually and in his official capacity; *THE ORLANDO TIMES*, a news weekly; DR. CALVIN COLLINS; & LOTTIE COLLINS,

Defendants.

ORDER

This action is before the court on defendants' motion for attorney's fees under 42 U.S.C. § 1988 (1988), for sanctions under Federal Rule of Civil Procedure 11, and for a supersedeas bond under Federal Rule of Civil Procedure 62(d). (Docs. 18, 19, 20, & 130). Plaintiff has opposed these motions. (Docs. 128, 129, 138 & 139).

I. Background

In February 1989, plaintiff filed a complaint alleging the following claims: violations under 42 U.S.C. §§ 1981, 1983, and 1985 (1988), violations under the first and fourteenth amendments of the United States Constitution, tortious interference with a business relationship, breach of contract,

and intentional infliction of emotional distress. All defendants answered and defendants The Orlando Times and the Collins' filed a counterclaim for assault.

After a five day trial, the jury returned a verdict for defendants on all plaintiff's claims and for plaintiff on defendants' counterclaim. After the trial, the court issued an order to show cause why plaintiff should not be sanctioned under Rule 11 for filing vexatious and frivolous pleadings. (Doc. 119). The court also instructed the parties to file memoranda and affidavits opposing or supporting the imposition of costs and attorney's fees. (Doc. 119). Both plaintiff and defendants responded to the court's order with memoranda and affidavits. (Docs. 125, 126, 127, 128, 129, 130, & 131).

On November 16, 1990, the court held a hearing on the imposition of Rule 11 sanctions and attorney's fees. Based on the evidence adduced at the hearing and on the court's observations of the pleadings and of the trial, the court determined that this lawsuit was frivolous and vexatious from the beginning. Accordingly, the court sanctioned plaintiff under Rule 11 and ordered him to pay the government the expense of selecting and maintaining a jury. In addition, the court granted defendant's motions for attorney's fees. The court permitted defendants to submit affidavits establishing the amount of their attorney's fees and allowed plaintiff to respond to these affidavits.

II. Legal Conclusions

A. Rule 11 Sanctions

"Rule 11 imposes a duty on attorneys to certify that they have... determined that any papers filed with the court are well-grounded in fact... and [are] not interposed for any

improper purpose." Cooter & Gell v. Hartmarx, 110 S.Ct. 2447, 2454 (1990); Fed. R. Civ. P. 11. As stated at the November 16 hearing, the complaint filed in this case was completely factually groundless from the outset. Plaintiff presented no cognizable evidence of a conspiratorial agreement between defendants Frederick, The Orlando Times, or the Collins's or of overt acts suggesting a conspiracy. See Collins v. Walden, 834 F.2d 961, 965 (11th Cir. 1987). Furthermore, plaintiff failed to present any cognizable facts to support his other claims.

Plaintiff contends that the complaint must have had some merit because it withstood defendants' motion to dismiss and motions for summary judgment, and because the court sent the case to the jury for deliberation on the merits rather than direct a verdict in favor of defendants at the close of plaintiff's case. The court, however, allowed the case to go to trial not because plaintiff presented sufficient evidence to withstand the pre-trial motions, but because the court wanted to see whether plaintiff could present any evidence at trial. Plaintiff further contends that the case must have been meritorious for the jury to spend four and one-half hours deliberating. During this time, however, the jury ate lunch, examined 118 exhibits, including 90 newspaper articles and advertisements Orlando Sentinel, the Orlando Times, and other publications, and deliberated over the counterclaim. In the court's opinion, a responsible jury would have needed at least four and one-half hours to read the newspaper articles alone. Finally, plaintiff has repeatedly accused the court of prejudice. As a result, the court sent the case to the jury not because it perceived factual basis for the claim, but because it wanted plaintiff to receive a jury verdict. Only then would plaintiff know that the outcome of the case was based on the merits rather than on judicial bias.

In sum, plaintiff signed the complaint and other papers when he knew or objectively should have known they

were factually groundless and, as a result, plaintiff is subject to monetary sanctions. See United States v. Milam, 855 F.2d 739, 743 (11th Cir. 1988); Donaldson v. Clark, 819 F.2d 1551, 1557 (11th Cir. 1987). As stated at the November 16 hearing, plaintiff must reimburse the government for the jury expenses. The jury expenses consist of paying the per diem allowances to the original pool of jurors used to select a jury, of paying the per diem allowances of the jury for five days, of milage allowances, and of the jurors' meals. The total cost amounted of selecting and maintaining the jury is $2,138.55. See Elster v. Alexander, 122 F.R.D. 593, 604 (N.D. Ga. 1988); Harrell v. Joffrion, 73 F.R.D. 267, 268 (W.D. La.), aff'd without an opinion, 545 F.2d 167 (5th Cir. 1976).

B. Attorney's Fees

Based on its observations of the pleadings, the trial, and the hearing, the court concludes that plaintiff's claims were "frivolous, unreasonable, or without foundation." Hughes v. Rowe, 449 U.S. 5. 14 (1980)(quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); 42 U.S.C. § 1988. In addition to its observations of the pleadings and trial, the court notes that plaintiff passed out business cards advertising that he sued city hall. This evidence suggests to the court that plaintiff would sue the city of Orlando or the mayor of Orlando on any pretense, including the frivolous one here.

As in his Rule 11 defense, plaintiff contends that the case must have been sufficiently meritorious to withstand both a motion to dismiss and motion for summary judgment. Plaintiff correctly notes that when the court contemplates awarding attorney's fees under section 1988, it should consider whether he established a prima facie case, whether the case was dismissed prior to trial, or whether the court held a full-blown trial on the merits. Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 1189 (11th Cir. 1985). As

previously stated, the court allowed the case to go to trial only to see whether plaintiff would present any evidence to support his allegations. In this case, however, decisive facts never emerged, the case was frivolous and unreasonable from the outset, and plaintiff failed "to produce any evidence in support of material issues" on any of his claims. Desisto College, Inc. v. Town of Howey-in-the-Hills, 718 F.Supp. 906, 915 (M.D. Fla. 1989), aff'd sub nom. Desisto College, Inc. v. Line, 914 F.2d 267 (11th Cir. 1990). Accordingly, the court awards attorney's fees to defendants under 42 U.S.C. § 1988.

Attorney's fees are calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The reasonable hourly rate is the "prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman v. Housing Authority, 836 F.2d 1292, 1299 (11th Cir. 1988). Defendant- Frederick submitted an affidavit establishing the number of hours expended on this case and an affidavit establishing the reasonable hourly rate for attorneys with comparable skill, experience, and reputation in the Orlando legal community. (Docs. 125 & 126). Based on these affidavits, the court awards defendant Frederick $27,203.50 in attorney's fees. The Orlando Times and the Collins's also submitted an affidavit establishing the number of hours expended on this case and what they considered to be a reasonable hourly rate. (Doc. 130). Although these defendants neglected to submit a supporting affidavit establishing the reasonableness of their hourly rate, the court nevertheless finds it reasonable Id. at 1303 ("where there is a lack of documentation or testimonial support the court may make the award on its own experience"). In addition the affidavits submitted by The Orlando Times and the Collins's do not state the time spent pursuing the unsuccessful counterclaim for assault. Accordingly, the court reduces the hours expended on the suit by twenty hours to reflect the

time spent on this unsuccessful claim and awards The Orlando Times and the Collins's $8,018.75 in attorney's fees. Id. at 1302 (district court should deduct time spent on unsuccessful claims). Plaintiff is responsible for paying defendants these amounts.

C. Supersedeas Bond

Plaintiff has appealed the judgment entered November 9, 1990. Defendant Frederick has moved for a supersedeas bond for the amounts awarded in this order pending plaintiff's appeal. The court grants defendants' motion and, on request for a stay pending appeal, requires plaintiff to post a supersedeas bond for Frederick's attorney's fees awarded in this order. Fed. R. Civ. P. 62(d).

III. Conclusion

The court finds that plaintiff violated Rule 11 and fines him to compensate the government for the expense of selecting and maintaining a jury. The court also finds that plaintiff's case was frivolous and factually groundless from the beginning and orders plaintiff to reimburse defendants for their attorney's fees. Finally, the court requires plaintiff to post a supersedeas bond for the total amount of Frederick's attorney's fees for which he is responsible as a result of this order. Accordingly, the court ORDERS plaintiff to pay $27,203.50 to defendant Frederick and $8,018.75 to defendants The Orlando Times and the Collins's. The court also ORDERS plaintiff to pay the court $2,138.55. Finally, the court ORDERS plaintiff to post a supersedeas bond for $27,203.50 in the event of appeal.

It is SO ORDERED in Orlando, Florida, this 17th day of December 1990.

\s G. Kendall Sharp
G. KENDALL SHARP, USDJ